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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JEFFREY MILAN, a single man, Plaintiff/Appellant, v. RAYMOND DION, dba D&D HOME IMPROVEMENTS, Defendant/Appellee.	2 CA-CV 2012-0009 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV201102591

Honorable Gilberto V. Figueroa, Judge

REVERSED AND REMANDED

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V Á S Q U E Z, Presiding Judge.

¶1 In this action arising out of a construction contract, Jeffrey Milan appeals from the trial court's order dismissing his complaint against Raymond Dion for lack of personal jurisdiction, pursuant to Rule 12(b)(2), Ariz. R. Civ. P. For the reasons stated below, we reverse and remand for further proceedings.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to Milan, the nonmoving party, but accept as true "the uncontradicted facts put forward by [Dion]." *Planning Grp. of Scottsdale, L.L.C. v. Lake Mathews Mineral Props., Ltd.*, 226 Ariz. 262, n.1, 246 P.3d 343, 345 n.1 (2011). In April 2010, Milan's home located in Apache Junction was extensively damaged by a fire. While on a family trip to New York later that month, Milan contacted Dion, a New York based contractor, to repair the house. Milan and Dion subsequently discussed the project during several telephone calls, and Dion eventually agreed to perform the repairs. Dion signed a contract in New York in April 2010, and Milan executed the contract in Arizona in July.[1]

¶3 By May 2010, Allstate Insurance Company (Allstate) already had issued payment based on its initial estimate of repairs prepared shortly after the fire. Believing that construction on the home soon could begin, Milan purchased an airline ticket for Dion to travel to Arizona in early May. Once Dion arrived, he and Milan gave written

[1]What the parties refer to as their contract is a proposal prepared by Dion, doing business as D&D Home Improvements (D&D), and accepted by Milan. The proposal form indicates that D&D would "furnish the materials and perform the labor necessary for the completion of [the i]nsurance [c]laim." It lists several items in need of repair and indicates that "[a]ll work [is] to be performed as per insurance payouts and proceeds." The proposal indicates $110,000 worth of work was to be completed.

notice to Milan's primary mortgage lender, America's Servicing Company (ASC), that Dion would perform the repair work and would be compensated with the insurance proceeds. They also inspected the home and determined additional insurance funds would be necessary to complete the job. Milan hired Brown-O'Haver (BOH), a public adjusting firm located in Mesa, to assist with the insurance claim, and he and Dion subsequently met with David Young of BOH to review the "rebuttal estimate" Young had prepared.

¶4 During that meeting, Milan and Dion discussed with Young "additions and amendments" to the rebuttal estimate. BOH submitted a supplemental request for funding to Allstate, which then prepared a revised estimate and issued an additional payment in July 2010 to Milan, BOH, and ASC, in the amount of $18,268.29.[2] However, because Milan was in arrears on his mortgage payments, ASC refused to release the funds. As the weeks passed, Dion completed a few small jobs for Milan and his neighbor in Arizona. However, the parties ultimately agreed that Dion should return to New York until the issue with the insurance proceeds was resolved. Milan purchased an airline ticket for Dion, who returned to New York on June 7. During the months that followed, Milan negotiated with ASC to modify the terms of his mortgage.

¶5 In January 2011, Milan and ASC finally reached an agreement, and ASC sent a payment of the insurance proceeds to Milan in Arizona in the amount of $31,555. But, because the parties had informed ASC that Dion would perform the repair work, the

[2]Allstate's first payment similarly had been made payable to Milan and ASC, pursuant to "the mortgage clause of the insurance policy."

check was made payable to him. "[B]ased on assurances that . . . Dion would return to Arizona as quickly as possible to start work on the [h]ouse," Milan mailed the check to Dion in New York. However, a dispute arose between them about monies Dion claimed he was owed for lost wages and other costs incidental to his earlier stay in Arizona. Consequently, Milan requested that Dion return the check and stated that he considered the contract void because Dion was not a licensed contractor in Arizona. Dion refused to return the check.

¶6 In July 2011, Milan filed this lawsuit, which, as amended, alleged claims of conversion, unjust enrichment, fraud, and negligent misrepresentation. Dion moved to dismiss the complaint, asserting, among other things, that "[the] court . . . lack[ed] personal jurisdiction over [him]." After hearing argument,[3] the court granted Dion's

[3]At the same hearing, the trial court heard oral argument on Milan's motion to strike Dion's reply, in which he had maintained Dion's counsel, Harry Konst, "is not a member of the State Bar of Arizona and is not authorized to practice law in Arizona." According to the minute entry from that hearing, the court and counsel discussed Konst's application to the State Bar of Arizona to appear pro hac vice and the court then decided to "proceed with the hearing with counsel for [Dion]."

On appeal, Milan contends the trial court "erroneously allowed . . . Konst to appear in this matter." However, Milan has not provided a transcript of the hearing at which this issue was addressed, and the record on appeal contains only the court's minute entry. Thus, we are unable to determine what conclusion the court had reached with regard to counsel's compliance with Rule 38(a), Ariz. R. Sup. Ct., which governs admission pro hac vice. It was Milan's duty as appellant to ensure the record on appeal was complete and to furnish this court with all necessary certified transcripts. *See* Ariz. R. Civ. App. P. 11(b)(1). Moreover, Milan's notice of appeal refers specifically to the court's order dated November 23, 2011, "dismissing Milan's Complaint for lack of personal jurisdiction." And, although we may construe a notice of appeal liberally, we cannot read into a notice something that is not there. *See Baker v. Emmerson*, 153 Ariz. 4, 8, 734 P.2d 101, 105 (App. 1986). We lack jurisdiction to consider matters not contained in the notice, and, in light of the deficiencies with both the record on appeal and the notice of appeal, we decline to address this issue further.

motion to dismiss, finding "it would not be fair nor reasonable to hale . . . Dion . . . into an Arizona Court under the facts of this case." This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-120.21(A)(1).

Discussion

¶7 Milan argues Dion has sufficient "minimum contacts with Arizona such that it is fair and reasonable" to subject him to personal jurisdiction in this state. Accordingly, Milan contends the trial court erred in dismissing his complaint for lack of personal jurisdiction, pursuant to Rule 12(b)(2), Ariz. R. Civ. P. On appeal, "[w]e review de novo a dismissal for lack of [personal] jurisdiction and 'simply look to [whether] the non-moving party ma[d]e a prima facie showing of jurisdiction.'" *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 569, 892 P.2d 1354, 1358 (1995), *quoting Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 612 (8th Cir. 1994). The plaintiff cannot meet this burden with bare allegations but must come forward with facts, established by affidavit or otherwise, supporting jurisdiction. *Macpherson v. Taglione*, 158 Ariz. 309, 311-12, 762 P.2d 596, 598-99 (App. 1988). Once such a showing has been made, the defendant has the burden of rebuttal. *Id.* at 312, 762 P.2d at 599.

¶8 "Arizona courts may exercise personal jurisdiction to the maximum extent allowed by the United States Constitution." *Planning Grp.*, 226 Ariz. 262, ¶ 12, 246 P.3d at 346; *see also* Ariz. R. Civ. P. 4.2(a). The question of personal jurisdiction, therefore, "hinges on federal law," particularly the Due Process Clause of the Fourteenth Amendment. *Uberti*, 181 Ariz. at 569, 892 P.2d at 1358. Due process protects a defendant from "the binding judgments of a forum with which he has established no

meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985), *quoting Int'l Shoe Co. v. Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 319 (1945). Thus, before a state court exerts jurisdiction over a nonresident defendant, it must be shown that the defendant "ha[s] certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe*, 326 U.S. at 316, *quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

¶9 There are two types of personal jurisdiction: general and specific. *Williams v. Lakeview Co.*, 199 Ariz. 1, ¶ 6, 13 P.3d 280, 282 (2000). Milan does not contend that Dion is subject to the general jurisdiction of Arizona courts[4] but, instead, argues the exercise of specific jurisdiction is proper. Specific jurisdiction is "jurisdiction with respect to a particular claim," and requires "sufficient contacts" with the forum such that it is "reasonable, in the context of our federal system of government, to require the [defendant] to defend the particular suit which is brought there." *Planning Grp.*, 226 Ariz. 262, ¶¶ 13-14, 246 P.3d at 346-47, *citing Int'l Shoe*, 326 U.S. at 317.

¶10 Our supreme court has adopted a "holistic approach" for determining whether specific, personal jurisdiction applies. *Planning Grp.*, 226 Ariz. 262, ¶ 25, 246 P.3d at 349. Under this approach, we focus on one question: "Considering all of the contacts between the defendant[] and the forum state, did th[e] defendant[] engage in

[4]An Arizona court "may exercise general jurisdiction . . . over its own citizens . . . and over non-resident[s] . . . whose activities in the state are 'systematic and continuous,'" even if the lawsuit's subject matter is wholly unrelated to the forum. *Planning Grp.*, 226 Ariz. 262, ¶ 13, 246 P.3d at 346, *quoting Int'l Shoe*, 326 U.S. at 320.

purposeful conduct for which [he] could reasonably expect to be haled into that state's court with respect to that conduct?" *Id.* There is no mechanical formula, however, and "[t]he facts of each case must [always] be weighed in determining whether personal jurisdiction would comport with fair play and substantial justice." *Id.* ¶ 15. A defendant's "casual or accidental contacts . . . with the forum state, particularly those not directly related to the asserted cause of action, cannot sustain the exercise of specific jurisdiction." *Id.* ¶ 16. "Nor can the requisite contacts be established through the unilateral activities of the plaintiff." *Id.*

¶11 Here, we first must determine whether Dion had sufficient minimum contacts with Arizona. Milan contends Dion had the requisite contacts, pointing primarily to the contract that involved Dion agreeing to repair Milan's fire-damaged house located in Arizona, as well as the steps Dion took toward fulfilling his obligations under that contract. In response, Dion argues he "ha[s] no ties to Arizona." According to Dion, Milan "reached out beyond Arizona, sought out . . . Dion in New York, and created a continuing relationship with . . . a citizen of the State of New York." Dion thus claims that New York is the more appropriate forum for resolution of this dispute. But as to Dion's second contention, our courts have repeatedly emphasized that "personal jurisdiction is not a zero-sum game." *Planning Grp.*, 226 Ariz. 262, ¶ 27, 246 P.3d at 349. In other words, the defendant may have sufficient minimum contacts with two states, such that maintenance of the lawsuit in either would be reasonable and fair. *Id.*

¶12 In granting Dion's motion to dismiss, the trial court apparently agreed with Dion's first contention, citing *Burger King*, 471 U.S. at 473, for the proposition that

"[Milan] 'reached out' beyond Arizona and created for himself consequences in New York." Based in part on that finding, the court therefore concluded that "it would not be fair nor reasonable to hale Defendant Dion, a New York resident, into an Arizona court under the facts of this case." In *Burger King*, the United States Supreme Court stated that "with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." 471 U.S. at 473, *quoting Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950). But this does not support the broader conclusion that specific jurisdiction does not apply whenever the plaintiff initiates the contact between the parties by "reaching out" to a resident of another state where, as in this case, the contract relates to property located in the forum state and is to be performed entirely in that state.

¶13 In *Burger King*, the defendants submitted their application for a franchise to Burger King's district office in Michigan; many of the negotiations were conducted by mail, by telephone, or in person with the Michigan district office; and defendants signed the franchise agreement in Michigan for a franchise located in that state. 471 U.S. at 466-67. Moreover, the Court noted that the defendants had "no physical ties to Florida . . . other than [defendant] MacShara's brief training course in Miami. [Defendant] Rudzewicz did not maintain offices in Florida and, for all that appears from the record, has never even visited there." 471 U.S. at 479. The Court nevertheless concluded personal jurisdiction in Florida was appropriate because the dispute "grew directly out of

'a contract which had a substantial connection with that State.'" 471 U.S. at 479, *quoting McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957). The same reasoning applies here.

¶14 Although we agree that who initiates the contact between the parties and where that contact occurs is relevant under Arizona's holistic approach to personal jurisdiction, the primary focus of the analysis is on the defendant's contacts with the forum state. *See Calder v. Jones*, 465 U.S. 783, 788 (1984), *citing Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (In judging personal jurisdiction, a court properly focuses on "the relationship among the defendant, the forum, and the litigation."); *see also Batton v. Tenn. Farmers Mut. Ins. Co.*, 153 Ariz. 268, 274 n.2, 726 P.2d 2, 8 n.2 (1987). "Quality, not the quantity of [the] defendant's activities, is what is persuasive." *Meyers v. Hamilton Corp.*, 143 Ariz. 249, 253, 693 P.2d 904, 908 (1984). Here, the parties contracted for Dion to repair Milan's house on real property located in Arizona, and Dion could fulfill his contractual obligations only in this state.[5] *See, e.g.*, *Caesar's World, Inc. v. Spencer Foods, Inc.*, 498 F.2d 1176, 1181 (8th Cir. 1974) (contract had substantial connection with Iowa since contract required performance there); *Molybdenum Corp. of Am. v. Superior Court*, 17 Ariz. App. 354, 356, 498 P.2d 166, 168 (1972) (jurisdiction based on contract proper where "either before or after the execution of the contract" the defendant engaged in some activity within the forum state).

[5]Dion maintains that New York is the proper forum because he signed the contract in that state. While the location of contract execution is an appropriate consideration, it is not dispositive. *See Burger King*, 471 U.S. at 466, 479-80 (contract signed in Michigan, but Florida jurisdiction upheld). And although Dion executed the contract in April 2010 in New York, Milan did not sign the acceptance until July 2010 in Arizona.

¶15 Dion nevertheless claims he never would have had any contacts with Arizona but for Milan "fraudulent[ly] induc[ing]" him to come to the state by suggesting that the funds necessary to complete the project were already in his possession. But nothing in the record suggests that Milan had agreed to compensate Dion before the work was completed. And even if Dion believed the insurance proceeds would be immediately available when he arrived in Arizona, he quickly learned this was not the case. Shortly after his arrival, Dion inspected the house with Milan, and together they determined that additional insurance proceeds would be necessary. Dion and Milan then met with Young, the public adjuster, to help in preparing the rebuttal estimate of repairs. Dion also assisted Milan in submitting a written proposal to ASC clarifying that Dion would complete the repairs and would be compensated with the insurance proceeds. Despite the delays that should have been readily apparent, Dion nevertheless remained in Arizona for several weeks. Dion returned to New York with the apparent understanding he would return to Arizona once Milan received the additional funds, and when those funds were finally released, they were made payable to him. Moreover, Dion prepared an application for an Arizona contractor's license, although he never submitted it due to the parties' dispute. Thus, we are not persuaded that Dion has met his burden of rebutting Milan's prima facie showing of jurisdiction. *See Macpherson*, 158 Ariz. at 312, 762 P.2d at 599.

¶16 Having determined that Dion has sufficient minimum contacts with Arizona, we also must determine whether Milan's claim "arise[s] out of those contacts." *Planning Grp.*, 226 Ariz. 262, ¶ 25, 246 P.3d at 349. Requiring a nexus "between a defendant's activities in the forum state and a plaintiff's cause of action . . . ensures that

forums will not exercise jurisdiction over non-resident defendants based solely upon random, fortuitous, or attenuated contacts." *Williams*, 199 Ariz. 1, ¶ 11, 13 P.3d at 283. Here, Dion's contacts with Arizona clearly arise from the contract he entered into with Milan. And, Milan's lawsuit is based on that contract, more specifically, monies Milan sent to Dion, which Dion allegedly kept despite not having completed the construction work. Thus, Dion's contacts with Arizona are not random or fortuitous, but are purposeful contacts that gave rise to this lawsuit.

¶17 Finally, we must determine whether it is reasonable to subject Dion to the jurisdiction of the Arizona courts. *See Uberti*, 181 Ariz. at 575, 892 P.2d at 1364. Because Milan has made a prima facie case of jurisdiction, the exercise of personal jurisdiction over Dion is "presumptively reasonable." *Ziegler v. Indian River Cnty.*, 64 F.3d 470, 476 (9th Cir. 1995). To rebut that presumption, a defendant "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477.

¶18 In determining whether the exercise of jurisdiction over a nonresident defendant is reasonable, we must balance several factors, including: the defendant's burden in litigating the case in the forum, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining relief in the forum, and the judicial system's interest in obtaining the most efficient resolution of controversies. *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cnty.*, 480 U.S. 102, 113 (1987). Here, the trial court found that Milan "owns property and either is now doing, or has in the past, done business in New York." Although this may be true, and Milan's contacts with New York

may lessen his burden of litigating there, he has a strong interest in obtaining relief in Arizona given that the property at issue is located here and he is an Arizona resident. Moreover, Arizona's interest in resolving this dispute is significant because one of its residents alleges harm by a nonresident. *See Burger King*, 471 U.S. at 473 (state has "manifest interest" in providing residents forum for redress). Thus, Arizona has a strong interest in this litigation, and it is "most efficient" to resolve the dispute in Arizona because one of the parties, the property, and most potential witnesses are here.

¶19 We acknowledge that Dion may be burdened by defending this lawsuit in Arizona, but we cannot say that burden is any greater than the burden faced by other litigants who defend lawsuits in foreign forums. Courts routinely have acknowledged that defending a lawsuit in a foreign court today is much less burdensome than it was years ago due to technological advances. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). And Dion makes only a conclusory statement that "it would not be reasonable nor fair to hale [him] . . . into an Arizona Court under the facts of the case"; beyond that, he offers no factual basis for why Arizona's exercise of jurisdiction would be unreasonable. In short, Dion has not shown that litigating this case in Arizona would "create a hardship on [him] sufficient to outweigh the state's interest in providing a local forum for its citizens." *Uberti*, 181 Ariz. at 575, 892 P.2d at 1364. The trial court therefore erred by granting his Rule 12(b)(2) motion to dismiss.

Disposition

¶20 For the reasons stated above, the trial court's order of dismissal is reversed, and we remand this case for further proceedings consistent with this decision.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge